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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 855

HERMAN TELFAIR,
Petitioner,
vs.
ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
and
LUCKENBACH STEAMSHIP COMPANY,
a corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT, ZIM ISRAEL NAVIGATION COMPANY, LIMITED, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OF HERMAN TELFAIR

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet.App. 3-8)[1] is reported at 428 F.2d 127 (CA 5, 1970).

JURISDICTION

The opinion of the Fifth Circuit was entered on June 19, 1970, and a Petition for Rehearing addressed thereto was denied on July 22, 1970 (Pet.App. 1). Petitioner

[1] "(Pet.App.)" refers to the Appendix to the Petition for a writ of certiorari filed in this cause.

Telfair invokes jurisdiction pursuant to: (1) 28 USC 1254(1) (providing that Certiorari is a method by which this Court may review decisions of the Courts of Appeals), 28 USC 2101(c) (providing, inter alia, that a petition for Certiorari in a civil action must be filed within ninety days), and Supreme Court Rules 19(1)(a) and (b), 21 and 22(3).

Of the above-cited provisions only Supreme Court Rule 19 is related to the substantive jurisdiction of this Court. This respondent submits that the petitioner has demonstrated no basis for jurisdiction under Rule 19 criteria. Respondent further submits that the question tendered by the petition is purely "episodic" and constitutes nothing more than a request that this Court reconsider the evidence and analyze specific facts. Such an analysis would have no negotiable value beyond the confines of this case and no relevance whatever to any body of federal law. Accordingly, Respondent submits that there are no "special and important" reasons for assuming jurisdiction of this case under Rule 19.

QUESTION PRESENTED

The Petitioner states, as the question presented, the following (Petition, pages 3-4):

> WHETHER A LONGSHOREMAN, PRIOR TO ENTERING THE HOLD OF A SHIP ON A RUNG LADDER, OWES A DUTY OF CARE TO HIMSELF A) TO SEARCH FOR AND DISCOVER GREASE ON A RUNG, WHERE THERE IS NO EVIDENCE THAT THE GREASE IS VISIBLE FROM THE DECK; OR B) TO WATCH A CO-EMPLOYEE GO DOWN THE LADDER IN ANTICIPATION OF AN UNSEAWORTHY LADDER.

We respectfully submit that the proper statement of the question is as follows:

> WHETHER, IN THE PARTICULAR CIRCUMSTANCES IN THIS CASE, THE FIFTH CIRCUIT'S DECISION THAT THE DISTRICT COURT HAD NOT ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL SO AS TO ALLOW A JURY TO ASSESS THE PLAINTIFF'S CONDUCT IS WORTHY OF CERTIORARI.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner concedes that there are none involved (Petition, page 4) and we agree.

STATEMENT OF THE CASE

Petitioner's statement of the trial and appellate proceedings (Petition, pages 4-8) is adequate. Petitioner's recital of trial testimony is cast in the light most favorable to Petitioner. However, the Fifth Circuit felt that, since Petitioner contended that the question of his comparative contributing negligence should have been summarily and conclusively resolved in his favor by the trial judge, the evidence should be viewed in the light most favorable to the party against whom such summary determination was requested (Pet.App. 6). In this light, the Fifth Circuit summarized the evidence as follows (Pet.App. 6):

> "Here, Beam, the first longshoreman to descend the ladder 'slipped a little bit' but did not fall. Telfair had he been watching, could have seen him slip as did one of the other longshoremen. Telfair was not watching, however, because he climbed onto the ladder while the first longshoreman was still de-

> scending. The seven men who followed Telfair also descended without incident. Testimony shows that Telfair warned them of his accident. But several other individuals used the ladder that afternoon without warning. Although the ladder had not been cleaned, they suffered no mishap. We do not say that contributory negligence was a strong defense. We decide only whether the district court abused its discretion in granting a new trial because it had granted a directed verdict on contributory negligence. We conclude that there was no abuse of discretion."

Thus, the Fifth Circuit, in concluding that the trial judge had not abused his discretion in allowing the jury to assess plaintiff's behavior, observed that there was sufficient evidence to warrant jury consideration of: (1) Whether plaintiff had exercised reasonable care when he failed to observe grease on the ladder either prior to or during his descent thereof even though a prior descender had slipped and his slipping *had* been observed by another standing near the plaintiff; (2) Whether plaintiff descended the ladder in a reasonably prudent manner in view of the fact that several others utilized the uncleaned ladder without any warning and without incident or injury.

ARGUMENT

Under this heading we will set forth reasons for denying the writ in this cause.

Petitioner's stated basis for jurisdiction herein is Supreme Court Rule 19 (1) (a) and (b). This Respondent submits that no basis for jurisdiction has been demonstrated under that rule. The decisions of this Court clearly teach that Rule 19 certiorari jurisdiction (formerly Rule 38(5)) will not be used "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925). Further, to warrant Rule 19 attention the issues must be "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75, S. Ct. 614, 616 (1955). Indeed, the only significant class of civil cases in which this Court has become involved in assessing evidence at all are the FELA and Jones Act cases where the lower Court *withheld* issues from jury determinations. See, e.g.: *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874, 77 S. Ct. 16 (1956); *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct. 413 (1949). The consideration which prompted the Court to grant certiorari even in these cases was succinctly stated in *Wilkerson*, supra, (336 U.S. 70-71):

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but *whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.* (Emphasis added)

Rogers v. Missouri Pacific R. Co., 352 U.S. 518, 77 S. Ct. 459 (1957), explained that this discretion is se-

lectively exercised to assure that lower courts do not "deprive litigants of their right to a jury determination." In other words the "importance" detected in these cases is the importance of maintaining the jury as a fact-finding body. Clearly, these decisions furnish no basis for jurisdiction here as the Petitioner is asking the Court to review the evidence once again and conclude that an issue should have been *taken away* from the jury.

Petitioner suggests "conflict" with *Cia Maritima Del Nervion v. J. Flanagan Ship Corp.*, 308 F. 2d 120 (CA 5, 1962); *D/S Ove Skou v. Hebert*, 365 F. 2d 341 (CA 5, 1966); and *Calderola v. Cunard Steamship Co.*, 279 F 2d 475 (CA 2, 1960). Even assuming intracircuit conflict would warrant assumption of jurisdiction, which is doubtful, the prior Fifth Circuit decisions in *Flanagan* and *Hebert* present no conflict whatever.[2] Petitioner quarrels with the Fifth Circuit's decision in this case because it affirms the trial judge's conclusion that contributory negligence was a jury question. Petitioner's reliance upon *Flanagan* and *Hebert* would suggest that those decisions, in similar circumstances, held that the plaintiff should be pronounced blameless by the Court and that the jury should not be allowed to assay his conduct. Such is not the case. *Flanagan* involved only the indemnity claims, the main suit by the injured party having been settled without a trial. The question of whether contributory negligence was for the jury never arose in the case and is not discussed in the Fifth Circuit opinion. *Hebert* was an appeal to the Fifth Circuit in a case tried without a jury in which the injured long-

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[2] Indeed, the author of the Flanagan decision is the author of the decision here under attack.

shoreman was found to be 20% contributorily negligent. The contributory negligence finding of the trial court was affirmed by the Fifth Circuit.

Calderola, supra, does not state whether the question of the plaintiff's contributory negligence was given to or withheld from the jury. And this decision conveys no teaching or ruling whatever regarding the propriety of submitting the question to the jury on particular facts.

Thus there is no conflict.

In sum, this Respondent submits that the sole burden and meaning of the decision of the Fifth Circuit in this case is that under the specific, peculiar, unique facts of this case the trial judge did not abuse his discretion in requiring the plaintiff's conduct to be considered by a jury. The opinion is purely episodic and has no negotiable meaning or value to any body of federal law. In these circumstances, assumption of certiorari jurisdiction is inappropriate.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Telfair's petition for a writ of certiorari should be denied.

DEWEY R. VILLAREAL, JR., ESQUIRE
and

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing Brief for Respondent Zim Israel Navigation Company, Limited, in Opposition to Petition for Writ of Certiorari have been mailed to Wagner, Cunningham & Vaughan, 403 Morgan Street, Tampa, Florida and Walter H. Beckham, Jr. and Podhurst and Orseck, 2nd Floor, Concord Building, 66 West Flagler Street, Miami, Florida, Attorneys for Petitioner; McClain and Turbiville, Marine Bank Building, Tampa, Florida and James O. Davis, Jr., of Brown, Dixon & Shear, 1810 Exchange National Bank Building, Tampa, Florida, Attorneys for Luckenbach Steamship Co.; Macfarlane, Ferguson, Allison & Kelly, 512 North Florida Avenue, Tampa, Florida, this _____ day of November, 1970.

DEWEY R. VILLAREAL, JR.